

Pages 1 - 39

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	NO. CR 18-00577-CRB
)	
MICHAEL RICHARD LYNCH and)	
STEPHEN KEITH CHAMBERLAIN,)	
)	
Defendants.)	
_____)	

San Francisco, California
Wednesday, November 29, 2023

TRANSCRIPT OF PROCEEDINGS

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Wednesday - November 29, 2023

1:55 p.m.

P R O C E E D I N G S

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THE CLERK: Calling Criminal Action CR-18-0577, USA
versus Michael Richard Lynch and Stephen Keith Chamberlain.

Counsel, please step forward and state your appearances
for the record.

MR. LEACH: Good afternoon, Your Honor. Robert Leach
on behalf of the United States. I'm here with Adam Reeves,
Kristina Green, and Zach Abrahamson.

THE COURT: All right. Good afternoon.

MR. MORVILLO: Good afternoon, Your Honor. Chris
Morvillo and Reid Weingarten for Mr. Lynch, who's present in
the courtroom.

MR. LINCENBERG: Good afternoon, Your Honor. Gary
Lincenberg. And two of my colleagues, Michael Landman and Ray
Seillie, are with me, along with our client, Mr. Chamberlain,
who is present in court.

THE COURT: All right. Good afternoon. Now, if
everybody is sitting, I am going to -- I left my papers in
chambers, so I'll be back in two minutes.

(Pause in proceedings.)

THE COURT: So I assume, in my absence, you were all
discussing who wants to come forward and represent Mr. Brandon
Sims; because if you do, you'll get a lot of credit, because

1 that's not a representation that's going to go easy that I can
2 predict, unless anybody has a different prediction. I see
3 there are some issues there.

4 All right. Well, thank you very much for coming.

5 This matter is on for a motion to dismiss as to the counts
6 and, in particular, a motion to dismiss Count 17, as a
7 basically improper joinder. Not an improper joinder, that it's
8 duplicitous and it ought not to survive in this indictment.

9 It's also on for discovery. I've received
10 Mr. Chamberlain's -- where are you Mr. -- there you are --
11 filing, requesting the issuance of subpoenas. And, of course,
12 I've received Mr. Lynch's request as well.

13 So let me -- and I've read everything.

14 So let me get to what I think is the heart of it, in terms
15 of the motions that are in front of me.

16 As to the first two motions, I'm denying those motions for
17 the reasons stated by the Government. I think that they
18 survive for the reasons that the Government has opposed the
19 dismissal.

20 Count 17 presents a different problem. Count 17 is
21 complicated. It's complicated because, I think, in part, the
22 cure for its, quote, duplicitous nature may very well rest with
23 the motion of -- pardon me -- with the bill of particulars.

24 The bill of particulars has been drafted, I think, with
25 sort of an escape clause, as the Defense points out. It's not

1 just unequivocal. It seems to, maybe, equivocate a bit. And,
2 of course, that's -- in the nature of a bill of particulars,
3 that's what a bill of particulars is designed to avoid.

4 It's a notice type of thing that says "This is what the
5 case is. And you're on notice it's this and it's not that."

6 And the Government -- I could order the Government to
7 refine its bill of particulars, and then see whether or not it
8 does survive it all.

9 That is a process that I could engage in, and which I
10 choose, at this point, not to engage in. Instead, the Court,
11 sua sponte, is severing Count 17 from the indictment, and the
12 defendant will -- the defendants will go to trial on the other
13 counts. I will at some point decide Count 17, and render a
14 judgment, but it will not be part of the initial trial.

15 The Court finds that, actually, both sides in this case
16 would be prejudiced by the -- for different reasons, by the
17 inclusion of Count 17 if it were part of this trial. And, in
18 particular, the length of the trial would be unduly lengthened
19 given the issues that would be introduced by Count 17. So I'm
20 severing it.

21 And, accordingly, the motions with respect to discovery
22 are hereby denied as moot. The subpoenas are hereby denied as
23 moot because the Court feels that it's not presently before it.

24 So with that surprise to everybody, do you want to
25 comment?

1 **MR. LEACH:** Could I first confer with -- for one
2 second with my counsel?

3 **THE COURT:** Confer. And if you want to say something,
4 you can say something. We're here. Everybody made the big
5 trip. So come on.

6 **MR. LEACH:** Thank you, Your Honor.
7 That didn't take long.

8 That's fine with the Government. Thank you.

9 **THE COURT:** Okay.

10 **MR. REEVES:** Good afternoon. Adam Reeves for the
11 United States.

12 **THE COURT:** Who's going to bell the cat?

13 **MR. WEINGARTEN:** I am quite surprised by the ruling.
14 Reid Weingarten for --

15 **THE COURT:** It's nice to have you back here,
16 Mr. Weingarten.

17 **MR. WEINGARTEN:** It's wonderful to be back. Thank
18 you.

19 You did catch me by surprise. I didn't expect that
20 ruling. But I would observe the following:

21 That, even without Count 17, my expectation at this trial
22 is that there will be a significant amount of post-acquisition
23 evidence clearly relevant and clearly admissible. And let me
24 just give a couple of examples.

25 The Government not only returned the superseding

1 indictment with Count 17, which changed the world. And, of
2 course, their bill of particulars talked about how they wanted
3 to introduce evidence of the first two quarters of 2012, and
4 that's obviously post-acquisition stuff.

5 They also indicated in their 404(b) motion, that whatever
6 happens with Count 17, the allegations that they've made
7 against Mike Lynch in Count 17 are coming in, or they're going
8 to endeavor to have them to come in as 404(b).

9 The combination of, obviously, of Count 17, the bill of
10 particulars representations made by the Government, and the
11 404(b) notice, caused us to request the additional evidence in
12 the form of our subpoenas. I still believe that, because of
13 the 404(b) motion, and because there's every expectation in our
14 defense that Mike Lynch will testify, and that his intent will
15 be critically important at this trial, and it will be
16 critically important to show how he behaved after the
17 acquisition, utterly consistent with innocence, that
18 post-acquisition stuff is going to be part of the trial, even
19 without 17.

20 I just -- that's my first reaction to the Court's ruling,
21 and I wanted to make that point to the Court today.

22 **THE COURT:** Okay. Well, I would say in response to
23 that, first of all: The question of what post-acquisition
24 activity would be permitted is a question which, obviously,
25 I'll decide upon being presented with, quote, offers of proof

1 as to its relevance and materiality and its probative value and
2 that it outweighs the undue consumption of time.

3 However -- now I say what is obvious -- this is not the
4 first time this case has gone to trial.

5 **MR. WEINGARTEN:** I know.

6 **THE COURT:** This case went to trial and, in some
7 respects -- some limited respects, and maybe different from
8 what you intend to do -- there was an offer by defense counsel
9 to go into post-acquisition conduct. That was -- and which I
10 denied.

11 Now, whether I correctly denied it or not -- that is to
12 say, in some larger sense, correctly denied or not isn't really
13 an issue because the circuit affirmed this -- the Court's
14 decision. So I would just say I'm not bound or -- nor are you,
15 to the rulings of this court in that case, or the appeal in
16 that case, as to certain aspects.

17 You are bound by the -- at least I am; I don't know if
18 you're bound by anything. I don't mean you to act in a
19 boundless way, I'm saying this Court has to follow what the
20 circuit says is law. And all I'm saying is that you should be
21 mindful of that when you make your presentation as to why, in
22 this particular case, it justifies proceeding in a particular
23 way.

24 And so I say that maybe this is more of an opening the
25 door-type of ruling. That is to say, maybe, if the Government

1 presents its case in a way consistent with pre-acquisition
2 conduct -- which they have to prove in any event; there's no
3 such thing as a hindsight fraud, it either occurred or didn't
4 occur as of the dates that it's alleged to have occurred. If
5 it didn't occur, whatever he did afterward makes no difference.

6 Which is, of course, somewhat instructive with Count 17,
7 because if he's acquitted of all the other counts, I think that
8 it becomes somewhat academic as to what would happen to
9 Count 17. I've not heard the Government ever prosecuting a
10 case solely of a coverup when the individual case has been
11 found not worthy of liability. And I'm sure that's not what's
12 in focus here.

13 Nevertheless, I would just encourage the Defense to lay
14 their -- to the extent they want to, consistent with their
15 defense, lay their cards on the table and get me to rule if I
16 can.

17 Now, I will say this -- now, you've come to up obstacle
18 number 2 with me. Obstacle number 2 is, I'm generally
19 reluctant to issue -- to rule on motions in limine in which I
20 think the context of the relevance of the motion is not
21 heightened for the Court's consideration, that it's not
22 presented.

23 Now, you're saying a different thing and I hear you.
24 You're saying: Look, Judge, our defense is in large part or in
25 some part dependent on post-acquisition conduct.

1 Maybe it is and maybe it isn't. I don't know. I don't
2 know. But I don't want anybody to be blindsided. I don't want
3 you to think that you're going to come here and try Case A, if
4 it's pretty clear that I'm not going to allow Case A in.

5 I mean, you can present it and you can argue it. But I
6 want you -- and I'm really preaching to the choir; the idea
7 that you wouldn't be prepared to try this case is beyond my
8 view.

9 I just want to make sure that we all see what the ground
10 rules are, whether we like them or not, as early on as we can
11 with the understanding that I -- I'm somewhat -- I'm reluctant
12 to deal with motions in limine about certain conduct that would
13 only become relevant if certain things happen.

14 Now, you say, well, your client will testify. And that
15 decision is entirely your client's. It may be that, after you
16 hear the case and your case-in-chief, you believe or your
17 client believes that he should not testify, or he wants to
18 testify. That's entirely his right.

19 And at that point, you make certain decisions. Or you may
20 make them in advance. But, indeed, the decisions that you're
21 going to be called on to make are essentially decisions that
22 are made in realtime. And the Court likes to be able to decide
23 things in realtime, because then I have an entire context.

24 So I say: Look, if the Government introduces certain
25 things, opens the door to certain issues, maybe something that

1 otherwise would be irrelevant, or otherwise would be
2 excludable, comes in.

3 Similarly, if the Defense says X, and they have something
4 in post-acquisition conduct that demonstrates not-X, then it
5 becomes relevant, where normally X or not-X wouldn't come in.

6 So everybody has got to lay it out. You lay it out to
7 yourself. I don't care what you decide. No problem one way or
8 the other. But lay it out to yourself and see how it goes, and
9 then figure out how you're going to deal with it. But I'm more
10 than willing to meet and discuss motions in limine in --
11 sufficiently in advance of the trial to allow the parties to
12 prepare, to the extent that I can be helpful in that regard.

13 **MR. WEINGARTEN:** May I say one more thing?

14 **THE COURT:** You may say whatever -- Mr. Weingarten, we
15 have the afternoon.

16 **MR. WEINGARTEN:** Thank you.

17 **THE COURT:** Go ahead.

18 **MR. WEINGARTEN:** So when I was last here, I talked
19 about the rule of the case and you said: No rule of the case.
20 You're completely different. Different defendant. You weren't
21 here the last time.

22 And I said, Great. And I thought you were prescient with
23 all that came afterwards because I did anticipate, you know, we
24 were going to have to take on Count 17 and all that, and that's
25 why we wanted more evidence with our subpoenas.

1 Having said that, I think you were prescient in that, this
2 trial, the trial in March, will be completely different than
3 the last trial.

4 **THE COURT:** Well, it would be different -- I can't
5 imagine that it will be completely different. I mean, they
6 arise out of the same indictment.

7 **MR. WEINGARTEN:** Well, that's fair. That's fair.

8 But I would say that there will be an active defense, and
9 there is an expectation that my client will testify.

10 When that happens, we are going to center on his intent.
11 We believe there's a tremendous amount of evidence utterly
12 inconsistent with culpability. And we expect an effective and
13 aggressive cross-examination, obviously, from my friends over
14 here.

15 I guess what I'm saying -- and I'm thinking aloud here --
16 is it seems --

17 **THE COURT:** We all do that.

18 **MR. WEINGARTEN:** Thank you.

19 There seems to me to be an inevitability that
20 post-acquisition stuff is going to be important, and it's going
21 to be relevant, and it's going to be admissible. And I'm just
22 trying to figure out how best -- and you're saying, perhaps a
23 motion in limine or a trial brief or something along those
24 lines, so that you're apprised of what we're intending to do.

25 **THE COURT:** Well, it's not that I'm concerned about

1 being surprised. I mean, that's the job.

2 **MR. WEINGARTEN:** Sure.

3 **THE COURT:** That's okay.

4 But I think what you can expect -- what you ought to
5 expect from the Court is the Court's candor, but you also want
6 to expect some indication of how the Court is going, and what
7 the Court thinks is in and what the Court thinks is out.

8 It just -- now, you don't have to agree with it and you
9 can contest it, but -- well, I don't know that I'm adding
10 anything to what you said.

11 So people would say "You've said enough. Don't say
12 anything more. You'll just get in trouble somewhere down the
13 line." Like somebody will come back and say "Well, didn't you
14 say this, Judge? Like, didn't you say this is a separate
15 case?"

16 **MR. WEINGARTEN:** I was --

17 **THE COURT:** Well, of course, it's a separate case; but
18 it's a separate case in which I don't think successfully can be
19 argued the territoriality of it. I mean, that was in the last
20 case, you know, you couldn't prosecute a person for this when
21 they're in England doing these things and so forth.

22 I mean, certain things have been decided. Certain
23 things -- your client's conduct with respect to this has not
24 been decided at all. Has not been heard.

25 **MR. WEINGARTEN:** Right.

1 **THE COURT:** As far as I'm concerned -- and I can
2 answer truthfully: I don't remember any of it. You know? I
3 mean, maybe -- it was -- what? -- five-years ago? I don't know
4 how long ago it was. Maybe that's the shelf-life of what
5 occupies my brain.

6 But, I mean, I don't know what, if any, his involvement
7 was. So you are -- in that regard, it's a -- it's a clean
8 slate. I hope -- I mean, I hope you understand that. I mean,
9 it's the truth. And we'll just see how it goes.

10 **MR. WEINGARTEN:** Okay.

11 I would request permission to consult with --

12 **THE COURT:** You can consult with him any time.

13 **MR. WEINGARTEN:** We didn't anticipate this ruling.

14 **THE COURT:** Go ahead. Mr. Morvillo is no stranger.

15 **MR. WEINGARTEN:** Okay. Thank you.

16 (Defense counsel conferring.)

17 **MR. LINCENBERG:** This is Gary Lincenberg. Hi, Judge.

18 **THE COURT:** Hello.

19 **MR. LINCENBERG:** Judge -- Mr. Weingarten -- they're
20 consulting on an issue with regard to the Court's ruling.
21 If -- I think it makes sense, there's a couple of points we
22 wanted to argue. They indicated it's okay, if it's okay with
23 the Court --

24 **THE COURT:** Sure.

25 **MR. LINCENBERG:** I'm going to have my colleague

1 Mr. Seillie, first, address the Court's ruling or tentative
2 ruling on one of the motions --

3 THE COURT: Tentative ruling? What was tentative
4 about it? If it was tentative, I apologize for that confusion.

5 MR. LICENBERG: When it's against me --

6 THE COURT: It's final.

7 MR. LINCENBERG: -- I like to think of it as
8 tentative.

9 THE COURT: All right. Okay.

10 Well, I'm not quite sure it's so against you.

11 MR. LINCENBERG: This has to do with -- I wasn't -- it
12 sounded like the Court ruled on our motion with regard to
13 statute of limitations or did --

14 THE COURT: Yes, I did.

15 MR. LINCENBERG: Okay. So that's what --

16 THE COURT: Oh, no. I'm sorry. The first two
17 motions, one was on the statute of limitations and the other
18 was your argument.

19 MR. LINCENBERG: There was an extraterritoriality by
20 Mr. Weingarten as well as.

21 THE COURT: The first two motions. Did I miss that?

22 MR. LEACH: One was on statute of limitations, Your
23 Honor.

24 THE COURT: What?

25 MR. LEACH: Sorry. One was on the statute of

1 limitations, Your Honor. The second was one on failure to
2 state a claim because of duplicity and failure to state a claim
3 for securities fraud.

4 I understand the Court is denying both of those --

5 **THE COURT:** Yes, I did.

6 **MR. LINCENBERG:** We had a separate statute of
7 limitations --

8 **THE COURT:** It's denied.

9 **MR. LINCENBERG:** Okay. Can we briefly be heard on a
10 part of that?

11 **THE COURT:** Sure.

12 **MR. LINCENBERG:** Thank you, Your Honor.

13 **THE COURT:** So -- oh, that's very nice. He got you to
14 make the argument.

15 **MR. SEILIE:** Exactly, Your Honor.

16 **THE COURT:** I just want to get this, really, down.
17 He -- after learning that I denied the motion, he now has
18 suggested that you make the argument.

19 **MR. SEILIE:** That's correct, Your Honor --

20 **THE COURT:** That's great.

21 **MR. SEILIE:** -- I think, he's trying to preserve his
22 record.

23 **THE COURT:** Pardon? Well, maybe I'll change my mind.
24 Go ahead.

25 **MR. SEILIE:** Ray Seilie on behalf of Steve

1 Chamberlain.

2 Your Honor, I just wanted to address one small part of the
3 statute of limitations motion.

4 **THE COURT:** Sure.

5 **MR. SEILIE:** There was a request -- in addition to the
6 request for dismissal on timeliness grounds, there was also a
7 request for additional discovery into the Government's purposes
8 for seeking these foreign materials.

9 **THE COURT:** Right.

10 **MR. SEILIE:** In our briefing, we identified the
11 circumstances which, in our view, lead to at least some
12 possibility that the reason these requests were sought in the
13 first place was in order to extend the statute of limitations
14 and not for a legitimate investigative reason.

15 In similar circumstances, I believe this court has
16 indicated that discovery would be appropriate in order to see
17 whether the purpose -- whether the Government's requests were
18 made as part of a good faith investigative purpose or made for
19 the improper purpose of simply buying themselves a three-year
20 extension of a statute of limitations.

21 **THE COURT:** And I was the one -- I think I was the one
22 who granted the extensions; right?

23 **MR. SEILIE:** You granted one of them, I believe.

24 **THE COURT:** I granted one. So you're saying I was
25 deceived by the Government?

1 **MR. SEILIE:** Well, I think -- and I can address -- at
2 least with respect to Count 2, which I could get into as well,
3 you were not the judge who signed off on that order. I believe
4 you only --

5 **THE COURT:** Who was it? Who was the judge?

6 **MR. SEILIE:** I believe it was Judge Chen, but I'm
7 not --

8 **THE COURT:** Oh, you could make a very good argument on
9 this. Go right ahead.

10 **MR. SEILIE:** It wasn't that you were -- none of
11 arguments that we raised in our motion indicate that you --
12 that anyone was deceived, Your Honor. I think the issue is --
13 you know, on their -- on the surface, these requests were not
14 really disputing that they sought evidence that's relevant to
15 some of the charges in this case.

16 The issue is more about the timing. When you look at the
17 timing, the Government is making these foreign requests right
18 before various statutes of limitation expire. And they're
19 seeking evidence that they either have in some form in their
20 possession already, or are seeking evidence that they would
21 have sought at the very beginning of their investigation.

22 These aren't sort of forms of evidence that you would only
23 know to seek after pieces of the investigation have been
24 completed.

25 **THE COURT:** How do you know they would have only

1 sought -- I mean, do you know the way the Government works?

2 I mean, the idea that the Government works according to
3 some well-defined pattern of practice is true in some cases.
4 But it's also not true in many other cases. Things occur to
5 them. They take a look at their evidence. Somebody says
6 something to them, and they say "Oh, well, maybe we can find
7 out from this and that," and so forth. I mean, they are --
8 that's just not the way they work.

9 If you were to give me some, you know, "This is the
10 protocol, you must do it this way," and they don't do in that
11 way, then I would have some concern. But I don't think there's
12 a real protocol that's laid out by DOJ.

13 And I think, practical experience tells me that
14 investigations are, for lack of a better word, haphazard.
15 They -- they come about as a result of somebody saying
16 something to them, somebody -- new eyes looking at it,
17 interpreting it differently. That's just the way it works.

18 **MR. SEILIE:** Well, Your Honor, I guess -- I'm sorry.

19 **THE COURT:** And I'm not quite sure what discovery
20 would really -- other than, of course, it would prolong it and,
21 of course, it looks at processes that are generally not looked
22 at in terms of disclosure. And it certainly complicates the
23 case. Though, in some cases it may be warranted.

24 I'm not saying it's never warranted. There is -- what you
25 sought is warranted. I think, in this case, though, it

1 doesn't -- it's not warranted, and that's why I've denied it.

2 So I want to thank you. And your dear associate there
3 owes you a big one.

4 **MR. SEILIE:** Thank you, Your Honor.

5 **THE COURT:** Okay. Thank you very much.

6 Yes. Who else are you throwing up here?

7 **MR. LINCENBERG:** I'll throw --

8 **THE COURT:** Take the sword -- listen --

9 **MR. LINCENBERG:** Two small points.

10 **THE COURT:** Yes.

11 **MR. LINCENBERG:** First, the Court issued an order for
12 us to file and proceed with letters rogatory as to a witness
13 named Rob Knight; he was one of Deloitte accountants.

14 I wanted to advise the Court, we didn't do that because
15 it's unnecessary. The Government has, in good faith, assisted
16 us, and Mr. Knight has now accepted subpoena --

17 **THE COURT:** That's great.

18 **MR. LINCENBERG:** -- to testify here in San Francisco.

19 The second point I wanted to mention -- so the parties
20 have done a lot of meeting and conferring. We have a tentative
21 schedule for depositions in the UK in January.

22 There is one witness in Australia that the Government
23 wants to depose. His name is Matt Stefan. And we had
24 discussed trying to do this in January because of the crunch of
25 time and what needs to be done in February and so forth.

1 Government counsel, as I understand it, has been trying in
2 good faith to secure testimony from Mr. Stefan. They were
3 unable to come up with a date in January. Government counsel
4 indicated that they're hoping to do so in February.

5 And I would ask the Court to set a deadline for the taking
6 of Mr. Stefan's deposition, if it's going to occur, as
7 February 2nd. And the reason I make the request is because
8 there's a -- a big crunch of tasks that we're all doing in --
9 every day now, but February and into March, it's going to be
10 overwhelming. There's motions --

11 **THE COURT:** Let me cut this short. I don't disagree
12 with you that it's a good idea to get this done early rather
13 than late. But the way I would proceed is I'm not going to set
14 a deadline; however, if the deposition then interferes with
15 other work, other things that you can't do both at the same
16 time, then I'll consider quashing it at that point.

17 But, in fairness, this is not a witness they control, as
18 far as I know. And you start giving deadlines and the witness
19 says, "All, I have to do is hold out until February 2nd, and
20 they'll never bother me again" -- not that they would think
21 that. Right. That's why I don't put a deadline.

22 Nevertheless, I'm sensitive to your request, and if it
23 turns out to be difficult, then you can come back to court and
24 explain to me why.

25 **MR. LINCENBERG:** Thank you, Your Honor.

1 **THE COURT:** Thank you. Okay.

2 **MR. REEVES:** Thank you, Your Honor. I had one quick
3 question, and I think that's it for the Government.

4 **THE COURT:** Good.

5 **MR. REEVES:** The trial will have a premium around
6 scheduling, and witnesses are already asking about what week
7 they would appear in the second of March and early April. My
8 question is: What is the schedule, the trial schedule,
9 roughly, that the Court intends to follow with regard to the
10 trial? How many -- what days, if you're in a position to tell
11 us?

12 **THE COURT:** Okay. So that's a function, in part, of
13 how long is this trying trial going to take?

14 **MR. REEVES:** Well, you just made it shorter, Your
15 Honor.

16 **THE COURT:** Well, arguably, but who knows.

17 Well, I think it's a good idea that you meet and confer,
18 if necessary. Come up with some proposals. I want to try -- I
19 think, as a general rule, we won't meet on Friday; I just think
20 that that's fine.

21 **MR. REEVES:** Okay.

22 **THE COURT:** The problem is that I know that counsel is
23 out of state or, worse, Los Angeles. And the question is, I
24 think, you do have to come in on Sunday, I just don't know how
25 to avoid -- I don't want to start late Monday morning, because

1 number one that depends on any number of things, and I've got a
2 jury, you know, which I assume I'll have 16 people sitting
3 here; that is four alternates.

4 **MR. REEVES:** We would recommend that, yes.

5 **THE COURT:** So I think I would go Monday through
6 Thursday; take my criminal calendar, move it to Friday; take my
7 civil calendar, move it to Friday.

8 I like to start, probably, 9:15 in the morning, run
9 until -- I don't know -- 10:00 at night, something like that,
10 10:00 or 11:00, whenever we're finished with the day's
11 witnesses, and then move on.

12 Has anybody got a problem with that?

13 **MR. REEVES:** That sounds great. Thank you very much,
14 Your Honor.

15 **THE COURT:** That's my trial law.

16 The last case I tried was in front of Judge Ingram, and he
17 asked how I liked it. It was 27 years ago. And I said then,
18 "Trial practice is for younger people."

19 I meant younger than myself. So that's all of you.
20 Because, now, I walk into a room and everybody in the room is
21 younger than myself, so I don't worry about that anymore.

22 But, no, we'll go to about 4:00 on any particular day.

23 In terms of order of witnesses, you should all feel free
24 to adjust that in any way that is consistent with witness'
25 schedules and so forth. So if you have to take somebody out of

1 order, fine.

2 And, also, I encourage -- and I know I'll have no problem
3 at all -- the trading of schedules; that is, that the
4 Government will tell you who's going to come in the next two
5 days, or something like that. Work all that out so that
6 everybody is prepared to proceed.

7 **MR. REEVES:** Your Honor, there has been productive
8 conferring with -- amongst the parties at a level that I've not
9 seen before. There's a high level of cooperation and
10 consideration around scheduling, around Mr. Lincenberg's point
11 about "the schedule is looming," and how important it is to get
12 things scheduled, and I think there's been a lot of progress.
13 So in that spirit, we've already begun to talk about notice and
14 disclosures to ensure that the trial proceeds in an efficient
15 way.

16 **THE COURT:** Let's work on document stipulation. I do
17 not want an argument about authenticity of documents if you
18 actually don't have a good faith belief that somehow the
19 document is a fake.

20 Now, I know, you know, saying it at today's date can be
21 quite different from saying it five years ago and so forth.
22 But, these are documents that were created at least five years
23 ago, and they've all been somewhat vetted.

24 So let's try to avoid all that. Work out stipulations.
25 You can read stipulations to the jury.

1 You know, what will matter in the case will be, you know,
2 ten witnesses -- and I don't know, can I say ten witnesses and
3 ten documents? I don't know whether that's fair in this case
4 or not; but it will be a limited number of documents and a
5 limited number of witnesses. And that's what it will turn on.

6 Okay. Anything else from anyone?

7 Yes, Mr. Weingarten?

8 **MR. WEINGARTEN:** If I may, Judge.

9 **THE COURT:** Oh, you're going to come and give me the
10 results of poll that was conducted.

11 **MR. WEINGARTEN:** No poll.

12 You did catch us by surprise with the ruling. And I heard
13 every word that you said. And I understand your rulings
14 completely. But I do want to just talk a little bit more about
15 the subpoenas that we requested.

16 **THE COURT:** Sure. Go ahead.

17 **MR. WEINGARTEN:** And I think there's some worthwhile
18 undertaking here in that I do think -- let me back up a half of
19 step.

20 Obviously, in our papers, we made certain representations
21 about the conduct of HP. We anticipate it because they're on
22 their witness list, all the upper-echelon HP witnesses
23 testifying. At the core of what we said is that we believe HP
24 made up, out of whole cloth, the allegation that there was a
25 \$5 billion fraud. That's a big statement by us, and we backed

1 it up with the documents that were our exhibits.

2 What we -- what we sought to do with the subpoenas is
3 supplement that presentation because we thought it would be
4 germane to the trial.

5 So now, you know, you've severed Count 17. We may still
6 have to deal with Count 17 one day in the world. And if we do,
7 for all the reasons that we put in our papers, we would like to
8 have those documents.

9 **THE COURT:** Well, wait. Let me stop you there.
10 Because you may have to deal with Count 17 -- though, actually,
11 I can't concede that you will. Because of one of two things
12 will happen -- maybe a third.

13 One is: He'll be convicted of a charge. And if he is,
14 nothing that I know in the sentencing statute that would
15 suggest that he get a sentence longer than that which is
16 prescribed in the sentencing statute.

17 The second alternative -- and perhaps the even more likely
18 one; I have no merits decision -- is he will be acquitted.
19 And, as I said before, if he's acquitted, I can't conceive that
20 the Government would go against him.

21 So I'm saying, I think, practically speaking, in either
22 event, you may never have to face Count 17. So I don't think
23 that -- and the reason I raise it is that's not the argument
24 that would convince me that "at some time you have to prepare
25 for it, so let's do it now."

1 **MR. WEINGARTEN:** I'm not done. So -- I live in the
2 world, so I understand everything you just said.

3 The 404(b) issue is important to us.

4 **THE COURT:** Well, we'll see how the -- now I've ruled.
5 Now I've ruled. And I've also told them what I think -- ways
6 that they can open the door and ways that they don't open the
7 door. So they're a bright group of young people --

8 **MR. WEINGARTEN:** I agree with that.

9 **THE COURT:** -- and they'll think of what I said, and
10 they'll realize that, you know, the rodeo in this court may not
11 be the rodeo in some other court. And this is what they're
12 facing, and so how do they want to deal with 404(b); what are
13 they really going to say now?

14 That's up to them. They come back and say, "Oh, no, it's
15 all coming in," and da-da-da, "and it's all 404(b)." You come
16 back with your subpoena requests. Okay?

17 And I know we have a time issue --

18 **MR. WEINGARTEN:** We do.

19 **THE COURT:** -- but let's not get all tied up about
20 that.

21 **MR. WEINGARTEN:** Here's my suggestion: I don't think
22 we need much from anybody, other than from us, in terms of the
23 subpoenas, in that the Government didn't object to the issuance
24 of the subpoenas. Let's say they're cut. And then we
25 negotiate or we fight with the lawyers from the entities, and

1 if there's a motion to quash then, of course, it's here.

2 **THE COURT:** That's one way to approach it, but it's
3 not mine.

4 But nice try. I don't blame you for saying it.

5 **MR. WEINGARTEN:** Can I try one --

6 **THE COURT:** I'm just saying, I'm not going to do it
7 that way; I'm going to do it another way. And we'll see what
8 the Government does.

9 Really, the ball is in the Government's court I mean -- or
10 the Court's court.

11 It's up to you guys to figure out how you're going to try
12 your case. Now you see what, at least, the Court thinks are
13 the parameters. They can change. And they can change in a
14 variety of ways. They can change by the Government's
15 presentation. They can change by your presentation. They can
16 change by the defendant testifying or not testifying. All of
17 those things. They can change by questions asked and answers
18 being permitted, of lines of questioning to witnesses.
19 Parameters can change.

20 It's a living thing, as much as anything can be a living
21 thing in court. And so the question is -- I don't -- that's
22 why I don't like to do these things, other than, basically,
23 trying to say, "This is what I think the case is going to be."
24 And then if it turns out to be different, it turns out to be
25 different.

1 **MR. WEINGARTEN:** Okay. Just one more point.

2 **THE COURT:** Go ahead.

3 **MR. WEINGARTEN:** Okay. My Spidey sense tells me that
4 post-ac is going to be relevant in this trial. And all I'm
5 saying right now is I would like to be armed with the relevant
6 evidence to meet it. And that's, simply stated, the subpoenas.

7 I don't think anybody is put out as a result of that,
8 other than, perhaps, the recipients of the subpoenas. And if
9 they're overbroad or whatever, we litigate or negotiate. As
10 simple as that.

11 I made that point --

12 **THE COURT:** Well, I would say this as to that -- first
13 of all, I'm not agreeing with you.

14 But, secondly, you can talk - I don't know. Can you not
15 talk to these people? Can you not send out your investigator
16 to talk to them? Do you know what they're going to say?

17 And maybe you don't want to do it that way.

18 **MR. WEINGARTEN:** There's not a love relationship right
19 now between HP and Mike Lynch.

20 **THE COURT:** That's probably true. I'll accept that.
21 Okay.

22 I don't know when -- look, that gets me into the
23 preparation of the case. I'm not --

24 **MR. WEINGARTEN:** You're not there. Okay.

25 One more, if I may.

1 Obviously, I understand from your rulings and such, and
2 many other judge's rulings, that the materiality standard is
3 objective; I understand that completely.

4 **THE COURT:** Right.

5 **MR. WEINGARTEN:** I also read your opinion in
6 *Bogucki* -- I don't know if I am pronouncing it correctly. It's
7 a very important case --

8 **THE COURT:** It is? I wrote it.

9 **MR. WEINGARTEN:** I know you did. That's why I'm
10 raising it.

11 And what you said there, simply stated --

12 **THE COURT:** Oh, I remember that case. Is that the one
13 that I gave a Rule 29?

14 **MR. WEINGARTEN:** You did.

15 **THE COURT:** Well, I remember it; they remember it even
16 more.

17 **MR. WEINGARTEN:** I understand that too. I understand
18 my friend over here probably remembers it most of all.

19 But the point I'm making now is: The relationship between
20 HP and Mike Lynch is relevant, from start to finish, based upon
21 that decision and --

22 **THE COURT:** I'm going to reread it.

23 **MR. WEINGARTEN:** Okay. But I --

24 **THE COURT:** I'm going to reread it, and if I change my
25 mind, I'll let you know.

1 **MR. WEINGARTEN:** I guess it just reinforces my point
2 that we should -- there's nothing inappropriate or nothing
3 crazy about us being armed for what I'm saying is likely to be
4 the inevitable.

5 And there's a sort of a practical issue. I mean, we're
6 going to London and do some depositions. There's every
7 expectation based upon the state of the case that post-ac would
8 be --

9 **THE COURT:** Let's see what they say. Let's see
10 what -- let's see what they say.

11 **MR. WEINGARTEN:** But, Judge, they're going to say it
12 in opening statement. That's --

13 **THE COURT:** No, no, no. They're going to say -- I
14 don't know, where are we on the 404(b) stuff?

15 I mean, maybe it's fair -- maybe it is fair for me to say
16 to the Government "Why don't you revisit the 404(b) and tell me
17 what it is that you're going to want to introduce on 404(b) in
18 light of the Court's decision?"

19 That's not unfair. I could ask that. I can ask that.

20 I mean, if it's their intention to go ahead and introduce
21 these topics, I think you're right. All I'm saying is I need
22 to know what their intention is.

23 Can you submit something on that issue?

24 **MR. REEVES:** I was going to try to answer the Court's
25 question. Would you like a submission?

1 **THE COURT:** Yes.

2 I don't know. Whatever -- I don't have it in front of me.

3 Whatever you've said about the 404(b) -- have you said
4 something about it? I assume you have.

5 **MR. REEVES:** Yes. I think --

6 **THE COURT:** Go take a look at it and just see, now,
7 what it is that you intend to do in terms of 404(b) material.

8 **MR. REEVES:** I can offer some direction.

9 **THE COURT:** I don't want direction. I want a writing.
10 I want something in written form.

11 **MR. REEVES:** That would be fine. We'll do that.

12 **THE COURT:** Okay.

13 **MR. WEINGARTEN:** One more thing, Your Honor.

14 **THE COURT:** One more thing? How many one-more-things
15 do you have, Mr. Weingarten?

16 **MR. WEINGARTEN:** I love being here, so I don't want to
17 sit down.

18 **THE COURT:** Stay as long as you want.

19 **MR. WEINGARTEN:** All kidding aside, we got the most
20 recent witness list from the Government; this was supposed to
21 be the final one. The one before that had 65 witnesses. This
22 one had, I think, 80.

23 **THE COURT:** Oh, it's going to the wrong direction.

24 **MR. WEINGARTEN:** It grew. And we request --

25 **THE COURT:** Oh, that's not good news.

1 **MR. WEINGARTEN:** I take them very seriously --

2 **THE COURT:** What's the next one? A hundred?

3 Where are you?

4 **MR. REEVES:** We're tightening up now, Your Honor.

5 **THE COURT:** That sounds -- that's not my definition of
6 tightening, 65 to 80.

7 **MR. REEVES:** Your ruling has helped.

8 **THE COURT:** Okay. Let's get a new witness list out.

9 **MR. WEINGARTEN:** All right. Thank you, Your Honor.

10 **THE COURT:** Anything else?

11 **MR. REEVES:** Not for the United States. Thank you,
12 Your Honor.

13 **THE COURT:** How about from the Defense, anything?

14 **MR. LINCENBERG:** No. Thank you, Your Honor.

15 **THE CLERK:** Judge, should I set aside March 18 through
16 April 2nd for this trial?

17 **THE COURT:** Yes. At least.

18 **MR. REEVES:** I think a little longer would be in --

19 **THE COURT:** I think so too.

20 **THE CLERK:** Okay.

21 **THE COURT:** What did we talk about?

22 **MR. REEVES:** You know, very roughly, I think it would
23 be appropriate -- I think, the Government's case is
24 approximately three to four weeks.

25 And I've heard that there will be a Defense case. I

1 think --

2 **THE COURT:** Let's take it to the end of April. That's
3 number one.

4 **THE CLERK:** Okay.

5 **THE COURT:** Let's do jury selection the week before.

6 **MR. REEVES:** Okay.

7 **THE COURT:** And on that issue, what I want are jury
8 questionnaires from both sides. I'm a great believer in jury
9 questionnaires. They are -- I've always wondered: Why is it
10 that 12 people that you know the least amount about sit as the
11 jury in a case?

12 And it seemed to me wrong. It seemed to me they are
13 people that you should know something about.

14 So also -- so a questionnaire, within limits -- and I,
15 you know, I don't want "Are you a member of the NRA," or "Do
16 you subscribe to 'Field & Stream'," or "What is your favorite
17 political party," or any of that. That's not going to be
18 asked.

19 But there are issues. Hewlett Packard, there may be
20 issues of publicity. There may be issues of corporations.
21 There may be issues about shareholders. I don't know. All of
22 this sort of thing, I think, can be fit in a questionnaire,
23 carefully designed.

24 Try to limit the questions -- I don't want to see some 85
25 questions -- but enough information that will tell you, "This

1 is a person I don't want," or "This is a" -- I mean, I
2 actually -- I know it's geared to cause challenges, but we all
3 know that it's used for more than that, if it's a successful
4 questionnaire. And so I don't mind it being -- cover the
5 field.

6 I also would remind the parties of the way I do voir dire
7 is I do the initial voir dire. The parties will get the
8 questionnaire in advance -- well in advance of the jury
9 selection. And then it's a question, if you have some
10 follow-up questions, you can ask some follow-up questions.

11 Obviously, I'll let the lawyers do it. Just don't
12 instruct on the law. Don't ask them how they judge the
13 evidence. But, other than that, you can introduce yourselves
14 to the jury so they know who you are.

15 And we'll deal with that.

16 **THE CLERK:** Should we set the jury selection for
17 March 12th?

18 **MR. MORVILLO:** There's already a scheduling order --
19 I'm sorry. Christopher Morvillo for --

20 **THE COURT:** What's the scheduling order say?

21 **MR. MORVILLO:** The scheduling order says March 13th
22 for jury selection.

23 **THE COURT:** Then that's when it is.

24 **MR. MORVILLO:** At least that's my recollection.

25 **THE COURT:** Okay. Whatever we said.

1 **MR. MORVILLO:** And, I believe, jury questionnaires are
2 proposed to the Court on January 10th.

3 **THE COURT:** That's great. Oh, good. So you've done
4 it all.

5 **MR. LINCENBERG:** With respect to the questionnaire, if
6 one of the questions is also going to serve the purpose of
7 time-qualifying jurors, we would suggest that the Court advise
8 them that the trial may go until the end of May.

9 And the reason I say the end of May is because if the
10 Government's estimating four weeks -- and let's just say that's
11 five weeks, possibly, and there's going to probably be a
12 lengthy Defense case -- and, frankly --

13 **THE COURT:** I think we'll say it will go into May.

14 **MR. LINCENBERG:** We'll go into May?

15 **THE COURT:** Yeah.

16 **MR. LINCENBERG:** That's fine. I'm just thinking, you
17 know, the Defense doesn't want to be pressed because people
18 have been told that they're --

19 **THE COURT:** Well, I press the lawyers all the time.
20 That's my -- I'm the presser.

21 **MR. LINCENBERG:** Right. But my --

22 **THE COURT:** No one does this better than I do.

23 **MR. LINCENBERG:** My experience --

24 **THE COURT:** Your experience --

25 **MR. LINCENBERG:** My experience is that what happens is

1 if a jury has been time-qualified for a certain time, and then
2 the judge starts getting nervous because we're approaching
3 that, that the pressure then hits the Defense because it's the
4 Defense case that goes later, and the pressure hits the jury
5 that they then, maybe, deliberate more quickly.

6 So my suggestion is just time-qualifying them through the
7 end of May. It doesn't mean the trial will go that long --

8 **THE COURT:** Okay. I think what I'll probably say is
9 estimated -- I'll try to take a look at it, and try to use some
10 words that are weaselly enough that they can't say "I didn't
11 know about it." But it will be something like "in the
12 neighborhood of two months."

13 If we start March 18th --

14 **MR. LINCENBERG:** Between trial, deliberation --

15 **THE COURT:** Well, I don't factor all that in. I mean,
16 the deliberations, that's --

17 **MR. LINCENBERG:** Well, just in terms of the jury
18 understanding how long they may be --

19 **THE COURT:** If you ask for a lifetime commitment from
20 these people, you're not going to get it.

21 **MR. LINCENBERG:** I'm not. But I just went through
22 this in Phoenix, where the jury was time-qualified. We lost a
23 week because of COVID in the middle of it anyways. Then the
24 judge had to just tell them at the end: You're coming back for
25 two weeks longer than what I said.

1 **THE COURT:** Well, I agree that it's better to deal
2 with this up front, rather than just -- okay. I'll figure out
3 what to say. I'll try to just think about it.

4 But if you actually are telling me that you think that the
5 presentation of your case will last a month -- that's what
6 you're telling me.

7 **MR. LINCENBERG:** I'm suggesting that the Court
8 anticipate that the Defense case may last as long as the
9 Prosecution case, even if we have fewer witnesses. If both of
10 our clients testify, it's going to be, probably, fairly
11 lengthy, and there's other witnesses and so forth. So better
12 safe than sorry.

13 **THE COURT:** Okay. I couldn't agree with you more.
14 You're absolutely right. I don't want to try this twice.

15 I don't think anybody wants to try it twice. Some people
16 may not want to try it once. So there we are.

17 Yes, Mr. Morvillo?

18 **MR. MORVILLO:** Your Honor, I'm just agreeing. I think
19 there will be clarity as we move forward --

20 **THE COURT:** I always hope for clarity. Rarely do I
21 get it, but I hope for it.

22 **MR. MORVILLO:** I mean, I'm optimistic that 80 will
23 become 20.

24 **THE COURT:** There you go.

25 **MR. MORVILLO:** Maybe that's over-optimism.

1 **THE COURT:** No, it's not. I like that optimism.

2 Yeah. Perfect.

3 **MR. MORVILLO:** That will fit in with the schedule that
4 we're talking about.

5 **THE COURT:** Yeah. Okay.

6 Anything else that anybody wants to say?

7 I will -- when am I seeing everybody again?

8 **MR. MORVILLO:** I think the next pretrial conference is
9 February 21st.

10 **THE COURT:** So everybody have a pleasant holiday.

11 Good luck on all those depositions.

12 **MR. REEVES:** Thank you, Your Honor. Thank you very
13 much.

14 **THE COURT:** Thank you.

15 (Proceedings adjourned at 2:47 p.m.)

16 ---o0o---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Saturday, December 2, 2023

A handwritten signature in blue ink, reading "Ruth Levine Ekhaus", followed by a horizontal line.

Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court